(21)

No. 90-97

In The

Supreme Court of the United States

October Term, 1990

AMERICAN HOSPITAL ASSOCIATION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF ST. FRANCIS HOSPITAL, INC. OF MEMPHIS, TENNESSEE AS AMICUS CURIAE IN SUPPORT OF PETITIONER AMERICAN HOSPITAL ASSOCIATION

JEFF WEINTRAUB
(Counsel of Record)
RICHARD D. BENNETT

WEINTRAUB, ROBINSON, WEINTRAUB & STOCK, P.C.
One Commerce Square
Suite 2560
Memphis, Tennessee 38103
(901) 526-0431

Attorneys for Amicus Curiae St. Francis Hospital, Inc.

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OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

I. DOES THE BOARD'S NEW EIGHT-UNITS RULE VIOLATE THE STATUTORY MANDATE CONTAINED IN SECTION 9(b) OF THE NATIONAL LABOR RELATIONS ACT THAT COLLECTIVE-BARGAINING UNITS ARE TO BE DETERMINED FROM THE FACTS IN EACH CASE?

II. EVEN ASSUMING THAT THE BOARD'S NEW RULE PRESUMING EIGHT-UNITS WOULD BE OTHERWISE APPROPRIATE, DOES THE BOARD'S MAKING SUCH A PRESUMPTION EFFECTIVELY IRREBUTTABLE VIOLATE THE SECTION 9(b) "IN EACH CASE" REQUIREMENT?

III. IS THE BOARD'S EIGHT-UNITS RULE CONTRARY TO CONGRESS' ADMONITION TO AVOID UNDUE PROLIFERATION OF BARGAINING UNITS IN THE HEALTH-CARE INDUSTRY?

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INTEREST OF THE AMICUS CURIAE[1]

St. Francis Hospital, Inc. of Memphis, Tennessee (hereinafter St. Francis) is an acute-care hospital and, therefore, is affected by the Rule promulgated by the

[1] This brief of Amicus Curiae is filed with the written consent of the parties. The letters giving consent have been separately filed with the Court.

National Labor Relations Board regarding appropriate bargaining units in the health-care industry. St. Francis, having been exposed to organizing efforts by groups of its employees and involved in years of related litigation (see *St. Francis "I"*, 265 N.L.R.B. 1025 (1982), and *St. Francis "II"*, 271 N.L.R.B. 948 (1984)), is acutely aware of the need to consider each request for a collective-bargaining unit on the facts of the particular case and the need to avoid undue proliferation of bargaining units in the health-care industry.

St. Francis is keenly interested in the outcome of this matter. If the Board's rule prevails, creating a virtually irrebuttable presumption that eight units are appropriate, St. Francis could be subject to organizing in the same maintenance unit found inappropriate in the past. St. Francis would have to challenge the appropriateness of the unit again, inevitably resulting in further litigation. St. Francis, therefore, submits this Brief in Support of the Petitioner American Hospital Association and requests that this Court find that the Rule promulgated by the National Labor Relations Board is invalid and reverse the judgment of the United States Court of Appeals for the Seventh Circuit.

STATEMENT OF THE CASE

This case arises out of a suit by the American Hospital Association (hereinafter, AHA) to permanently enjoin the National Labor Relations Board (hereinafter, NLRB or the Board) from enforcing its newly promulgated Rule, 29 C.F.R. § 103, pertaining to bargaining units in the health-

care industry (hereinafter, the Rule). Promulgated under Section 6 of the National Labor Relations Act (the NLRA or the Act), 29 U.S.C. § 156, the Rule establishes eight units, and only eight units, as presumptively valid for collective-bargaining purposes in the acute-care hospital industry. In promulgating the Rule, the Board has disallowed parties from raising as reasons to rebut the presumption virtually all of the factors raised by parties for the past 13 years to dispute unit appropriateness.

AHA asked the district court below to declare the Rule invalid, based on three alternative grounds: (1) the Rule contravenes Section 9(b) of the Act, 29 U.S.C. § 159(b), which provides that bargaining-unit determinations must be made "in each case," (2) the Rule contravenes the 1974 health-care amendments, which mandate that the Board avoid undue proliferation of bargaining units in the health-care industry, and (3) the Rule is arbitrary and capricious and is not supported by substantial evidence. *American Hospital Association v. NLRB, et al.*, 718 F. Supp. 704, 705 (N.D. Ill. 1989). The district court found the Rule invalid and granted AHA's request for injunctive relief. *Id.* at 716. The court stated that the "in each case" language required the Board to make unit determinations tailored to each individual case. *Id.* at 712-13. The court found that this limitation did not foreclose the Board from undertaking rulemaking in fulfilling its Section 9(b) charge, but the court left for another day the question of limitations to the Board's rulemaking function under Section 9(b). The court further found that, in light of the congressional admonition to give consideration to undue proliferation of bargaining units in the

health-care industry, a rule that designates such an absolute number of appropriate units and mandates a particular division of the workforce is not responsive to Congress' express concern. *Id.* at 716. The court found it unnecessary to reach AHA's claim that the Rule was arbitrary, capricious, and not supported by the evidence. *Id.*

The NLRB appealed the district court's decision, and, in *American Hospital Association v. NLRB, et al.*, 899 F.2d 651 (7th Cir. 1990), the Seventh Circuit reversed, finding that Section 9(b) does not require the Board to make bargaining-unit determinations on a case-by-case basis, and that, to the extent that unit determinations must be made on a case-by-case basis, the Board's resort to formal rulemaking satisfied this requirement. The Seventh Circuit further found that the Rule did not violate the congressional admonition and that the rule as promulgated by the Board was not arbitrary or capricious. *Id.* at 659-60. Thereafter, AHA petitioned this Court for a Writ of Certiorari, pursuant to 28 U.S.C. Section 1254, such Petition being filed within 90 days of the entry of judgment of the Court of Appeals. Pursuant to Supreme Court Rule 37, St. Francis as amicus curiae filed a timely brief in support of Petitioner American Hospital Association. On October 9, 1990, this Court granted the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

SUMMARY OF THE ARGUMENT

Although the Act does not entirely foreclose the Board from promulgating rules regarding the determination of appropriate collective-bargaining units, a rule, such as the present one, which does not give consideration to the congressional mandate that collective bargaining units be determined upon the facts of each individual case, is improper. The Rule is inconsistent with the language of the NLRA that unit determination be undertaken on an individual case-by-case basis.

The pertinent legislative history illustrates that, in 1934-35, all involved in the legislative process of what would ultimately become Section 9(b) were well aware that Congress had chosen the Board to make bargaining-unit determinations; no modification of the original Section 9(b) language was necessary to clarify that point. Therefore, the "in each case" language, which was added to the final version of Section 9(b) for "clarification," was added to the Section for some reason other than choosing the Board as the unit determiner. The real reason, according to the plain meaning of the "in each case" phrase, was to instruct the Board to make bargaining-unit determinations based upon the facts of each individual case.

In the past, the Board and the courts have all concluded that Section 9(b) (and other, similar statutes) requires the Board to make unit determinations on a case-by-case basis and further have held that many of the eight units designated by the new Rule are, in fact, sometimes inappropriate, depending on the circumstances of the case. Therefore, the Board, by exercising (out of futility) its rulemaking authority, has substituted a quick-fix

resolution of bargaining-unit disputes for the required case-by-case determinations that allow each party to show which units are appropriate in any facility. Only in individual proceedings can the board properly weigh the competing claims for particular units.

Further, the Rule is improper in light of Congress' enunciated concern that the health-care industry is vulnerable to labor unrest and that, therefore, the Board should give due consideration to preventing proliferation of bargaining units in this industry. A health-care rule mandating eight units fails to take into account Congress' express concern. For these reasons, the judgment of the United States Court of Appeals for the Seventh Circuit should be reversed.

ARGUMENT

I.

CONTRARY TO THE DECISION OF THE COURT OF APPEALS, THE BOARD'S NEW EIGHT-UNITS RULE VIOLATES THE STATUTORY MANDATE CONTAINED IN SECTION 9(b) OF THE NATIONAL LABOR RELATIONS ACT THAT COLLECTIVE-BARGAINING UNITS ARE TO BE DETERMINED FROM THE FACTS IN EACH CASE

Section 9(b) of the National Labor Relations Act, 29 U.S.C. § 159(b), provides the following:

> The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit,

> craft unit, plant unit, or subdivision thereof:
> . . . .

The language of the statute appears to be unambiguous: The Board is to determine the appropriateness of bargaining units based upon the facts of each individual case.

While Section 6 of the Act allows the Board of promulgate rules and regulations as it deems necessary to effectuate the policies of the Act, 29 U.S.C. § 156, St. Francis, in agreement with the Petitioner (see Petition for Certiorari, at 13), submits that Section 9(b) is a limitation on the Board's ability to promulgate a Rule relating to determining appropriate bargaining units. Read together, the two sections provide that the Board may promulgate rules and regulations regarding determination of appropriate bargaining units so long as such rules allow for unit determinations to be made on a case-by-case basis.

The Board exceeded its rulemaking authority under Section 6 in promulgating a Rule that eight, and only eight, units shall be appropriate for all acute-care hospitals.[2] Such a rule does not allow for unit determinations to be made on the required case-by-case basis.

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[2] The Board's Rule provides that, "except in extraordinary circumstances," the following eight units "shall be appropriate units, and the only appropriate units" for all acute-care hospitals:

(1) All registered nurses.

(2) All physicians.

(3) All professionals except for registered nurses and physicians.

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Although the Board did provide that it would not apply the rule in "extraordinary circumstances," it emphasized that such extraordinary circumstances would be extremely rare. The Board listed a number of factors that it will not consider to be such "extraordinary circumstances."[3] These excluded factors are basically the same

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(4) All technical employees.

(5) All skilled maintenance employees.

(6) All business office clerical employees.

(7) All guards.

(8) All other nonprofessional employees.

29 C.F.R. § 103.30, The National Labor Relations Board's Final Rule for Collective-Bargaining Units in the Health Care Industry, 54 Fed. Reg. 16347-48 (1989).

[3] These factors will not be considered by the Board as "extraordinary circumstances":

(1) Diversity of the industry, such as the sizes of various institutions, the variety of services offered by individual institutions, including the range of out-patient services provided, and differing staffing patterns among facilities (as, for example, a particular facility employing a larger or smaller number of RNs than generally employed by similarly situated hospitals);

(2) Increased functional integration of, and a higher degree of work contacts between, employees as a result of the advent of the multicompetent worker, increased use of "team" care, and cross-training of employees;

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criteria the Board formerly used in making case-by-case bargaining-unit determinations. By eliminating these factors as bases for challenging unit appropriateness, the Board has effectively precluded any meaningful challenge to its eight-units rule, thereby subverting the statutory mandate that all unit determinations be based on a case-by-case analysis.

While the Board may not enlarge its authority beyond the scope intended by Congress, the Board may, where restrictive intention is not shown, adopt rules and regulations to carry out its myriad functions in a manner consistent with the fulfillment of the purposes of the Act. *Department & Specialty Store Employees Union v. Brown*, 284 F.2d 619, 627 (9th Cir. 1960). Here, however, restrictive intention is shown by Congress' inclusion of the "in each case" language in Section 9(b).

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(3) The impact of nation-wide hospital "chains";

(4) Recent changes within traditional employee groupings and professions, *e.g.*, the increase in specialization among RNs;

(5) The effects of various governmental and private cost-containment measures; and

(6) Single institutions occupying more than one contiguous building.

Notice of Proposed Rulemaking, 53 Fed. Reg. 33,932 (1988).

A. The "in each case" Language Contained in Section 9(b) Requires the Board to Make Unit Determinations Based upon the Facts of Each Individual Case; it does not Relate to the Congressional Choice of Who Should Make Unit Determinations.

Section 9(b) provides that the Board shall decide "in each case" the unit appropriate for collective bargaining. 29 U.S.C. § 159(b) (1973). However, as originally drafted, Section 9(b) did not contain the "in each case" language. The Bill as introduced by Senator Wagner provided as follows:

> (b) The Board shall decide whether, in order to effectuate the policies of this Act, the unit appropriate for the purpose of collective bargaining shall be the employer unit, craft unit, plant unit, or other unit.

S. 1958, 74th Cong., 1st Sess. 9(b) (1935), *reprinted in* Legislative History of the National Labor Relations Act, 1935, Vol. I at 1295 (1985) (hereinafter Leg. Hist.).[4]

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[4] Senator Wagner originally proposed the "Labor Disputes Act," S. 2926, 73d Cong., 2d Sess. 1 (1934), Leg. Hist., Vol. I at 1, predecessor to the National Labor Relations Act, during the 73d Congress. Therein, at Section 207(a), Senator Wagner provided that "[t]he Board shall decide whether eligibility to participate in elections shall be determined on the basis of employer unit, craft unit, plant unit, or other appropriate grouping." S. 2926, 73d Cong., 2d Sess. 19 (1934), Leg. Hist., Vol I at 11. Thus, as early as 1934, Senator Wagner intended that the *Board* was to determine appropriate bargaining units. Although this Bill was never enacted, it served as a guide to the National Labor Relations Act introduced and passed the following year.

The "in each case" language did not appear in this statute until May 1, 1935, when Section 9(b) was revised to read as follows:

> (b) The Board shall decide *in each case* whether, in order to effectuate the policies of this Act, the unit appropriate for the purpose of collective bargaining shall be the employer unit, craft unit, plant unit, or other unit.

S. Rep. No. 573, 74th Cong., 1st Sess. 12 (1935), Leg. Hist., Vol. II at 2291 (emphasis added).

In the present case, the court of appeals held that the "in each case" language was added to indicate that the Board, not the employees, employer, or Congress, was to determine the appropriate unit for collective bargaining. *American Hospital Ass'n v. NLRB*, 899 F.2d at 656. However, *from its inception*, the original language of Section 9(b) had indicated that it was to be the Board that would determine the appropriate bargaining unit. Both the version introduced in 1934 before the 73d Congress in the "Labor Disputes Act," and the original version introduced in 1935 before the 74th Congress, clearly indicated that unit determinations were to be made by the Board.

The fact that it was obvious to everyone who read the original language of the proposed statute that Congress had decided to empower the Board to make bargaining-unit determinations, is evidenced by the number of associations and other interest groups that wrote to and appeared before Congress to protest the congressional choice of the Board as the bargaining-unit determiner. Hearings on S. 1958 before the Senate Comm. on Education and Labor, 74th Cong., 1st Sess. 302, 736-56 (1935), Leg. Hist., Vol. II at 1688, 2122-42.

Many of these interest groups argued that the employees themselves, not the Board, should have the right to determine their own units. Typical is the comment of R.W. Ayres, Chairman of the Employee's Representation Committee with Northwestern Bell, who opposed the portion of the pre-"in each case" Section 9(b) allowing the Board to determine the appropriate unit for collective-bargaining purposes; rather, said Mr. Ayres, "the employees should have the right to set up their own units for collective bargaining without interference from any outside force." As a result, Mr. Ayres declared, "we object to Section 9(b) in its entirety." Hearings on S. 1958 before the Senate Comm. on Education and Labor, 74th Cong., 1st Sess. 737 (1935), Leg. Hist., Vol. II at 2123.

As indicated by such comments, it was clear to everyone involved, from the original language of Section 9(b) (which lacked the "in each case" language) that Congress had decided to establish the Board, not the employees or anyone else, to decide appropriate bargaining units. It strains logic to imagine that Congress would have thought it necessary to *modify* the original version of Section 9(b) so as to reflect a choice for the Board as the bargaining-unit determiner, as held by the Seventh Circuit, when all involved in the legislative process certainly understood the original language to already make that choice.

An examination of the testimony of Secretary of Labor Frances Perkins, who testified in 1935 before the Senate Education and Labor Committee, sheds further light on the true purpose of the "in each case" language. At the conclusion of her testimony (which consisted primarily of arguing why the Labor Board ought to be made

a part of the Department of Labor), Secretary Perkins indicated that she had a "number of other small amendments" to make to the Act "for the sake of *clarity*" and for "*clarification* of the duties and powers of the Board." Hearings on S. 1958 before the Senate Comm. on Education and Labor, 74th Cong., 1st Sess. 66 (1935), Leg. Hist., Vol. I at 1442 (emphasis added). One of these "small amendments" proposed was the inserting of the "in each case" language in Section 9(b). Hearings on S. 1958 before the Senate Comm. on Education and Labor, 74th Cong., 1st Sess. 69 (1935), Leg. Hist., Vol. I at 1445; Hearings on H.R. 6288 before the House Comm. on Labor, 74th Cong., 1st Sess. 284 (1935), Leg. Hist., Vol. II at 2758.

Secretary Perkins did not further expand on the reason for the language change. However, since those who had read the original Section 9(b) language already knew that that language chose the Board to make bargaining-unit determinations, there was certainly no need for "clarification" (Secretary Perkins' word) to make that point. Therefore, "clarification" must have referred to clarifying some other point.

In addition, Secretary Perkins' reference to "clarifying" the "duties and powers of the Board" suggests the true purpose of Secretary Perkins' amendment. The use of the word "duties" suggests actions the Board would be required to take. The Seventh Circuit's interpretation of the "in each case" phrase is, therefore, incorrect, since *Congress'* act of choosing the Board over employees does not connote a "duty" of the Board itself. On the other hand, the obligation to make unit determinations in each individual case would certainly be considered a "duty" of the Board.

In spite of the various reasons offered by the Seventh Circuit to explain the "in each case" language, it can surely be said that one of the reasons was *not* that Congress wanted to clarify Section 9(b) so that everyone would understand that the Board was responsible for making the decision as to unit appropriateness. The original pre-enactment Section 9(b) language chose the Board; therefore, it was unnecessary to make any other changes in Section 9(b) in order to clarify this choice. Since the "in each case" language logically does not relate to the congressional choice of who should make unit determinations, it must relate to some other purpose: *how* the Board was to make unit determinations.

A plain reading of the "in each case" phrase, and in light of Secretary Perkins' comments and the legislative history of Section 9(b) as a whole, indicates that the "in each case" language was inserted to clarify that it was the Board's duty to make unit determinations based upon the facts of each individual case.

Petitioner and St. Francis' position is further supported by the Committee Report that accompanied the House version of the Act. H.R. Rep. No. 969, 74th Cong., 1st Sess. 20 (1935), Leg. Hist., Vol. II at 2930. Therein, the House explained that it chose the Board to make bargaining-unit determinations because such determinations had to be made "in each individual case." *Id.* Stated the House Report:

> Section 9(b) provides that the Board shall determine whether, in order to effectuate the policy of the bill (as expressed in sec. 1), the unit appropriate for the purposes of collective bargaining shall be the craft unit, plant unit,

> employer unit, or other unit. *This matter is obviously one for determination in each individual case,* and the only possible workable arrangement is to authorize the impartial governmental agency, the Board, to make that determination.

Id. (emphasis added).

The Seventh Circuit did not give the "in each individual case" phrase its complete meaning when it said – referring to the House's explanation – "[a]ll this appears to mean is that unit determination is a task meet for the Board rather than for either the Congress or the employees themselves." *American Hospital Ass'n v. NLRB, et al.*, 899 F.2d at 606. To adopt the Seventh Circuit's rationale would render the above-emphasized portion of the House's explanation meaningless, since the latter part of that phrase states that the Board is to make unit determinations. The comment makes two points, (1) unit determinations are to be made on a case-by-case basis, and (2) the Board is to make such determinations. The Seventh Circuit acknowledges the latter point, but not the former. It is a general rule of statutory interpretation that a court should not construe a statute in a way that makes words or phrases meaningless, redundant, or superfluous. *Zimmerman v. North American Signal Co.*, 704 F.2d 347, 353 (7th Cir. 1983). Instead, a court should interpret a statute in a light that gives full effect to the language of the statute. *See Department & Specialty Store Employees Union v. Brown*, 284 F.2d 619, 626 (9th Cir. 1960). The Seventh Circuit's rationale renders the House's statement that "[t]his matter is obviously one for determination in each individual case," meaningless.

Therefore, the Seventh Circuit erred in finding that the Board is not required to make unit determinations based on the facts of an individual case.

B. The Court of Appeals' Holding that Section 9(b) Does Not Require Unit Determinations to be Made on a Case-by-Case Basis is Contrary to Years of Established Case Law.

For over fifty-five years, the Board and the courts have interpreted Section 9(b) to mandate that bargaining units be determined on a case-by-case basis. *See, e.g., NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 134 (1944); *NLRB v. Esquire, Inc.*, 222 F.2d 253, 256 (7th Cir. 1955); *Kalamazoo Paper Box Corp.*, 136 N.L.R.B. 134, 137 (1962). In *St. Francis II*, the Board reiterated its understanding of the case-by-case mandate contained in Section 9(b):

> The analysis we set forth today establishes neither a minimum nor a maximum number of appropriate bargaining units, but rather permits the determination to be made on the facts of the particular facility involved. We believe that this approach comports with Congress' intent that the Board be free to exercise flexibility in dealing with unit determinations on a case-by-case basis.

271 N.L.R.B. 948, 951 n. 17 (1984).[5]

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[5] Section 9(b) applies to unit determinations for all bargaining units, not just those in the health-care industry. The Board's longstanding practice has been to make unit determinations in each individual case, giving consideration to the unique facts of each situation. It is well recognized that a court

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Likewise, the Eighth Circuit has held that bargaining-unit determinations must be made based upon the facts in each case. *NLRB v. May Department Stores Co.*, 146 F.2d 66, 68 (8th Cir. 1944). *See also NLRB v. Metal Container Corp.*, 660 F.2d 1309, 1313 (8th Cir. 1981) (craft unit determinations are to be made on a case-by-case basis after weighing all of the relevant factors). The Sixth Circuit has held that "an appropriate unit is a question of fact to be determined by the Board upon the facts of each case." *Metropolitan Life Insurance Co. v. NLRB*, 330 F.2d 62, 65 (6th Cir. 1964), *vacated on other grounds*, 380 U.S. 525 (1965).

In *Kalamazoo Paper Box Corp.*, 136 N.L.R.B. 134, 137 (1962), the Board stated that its obligation under the statute was to enforce the mandate of Congress that the unit appropriate for the purposes of collective bargaining should be decided in each case. In addition, the Board stated the following:

> Because the scope of the unit is basic to and permeates the whole of the collective-bargaining relationship, each unit determination, in order to further effective expression of the statutory purposes, must have a direct relavancy to the circumstances within which collective bargaining is to take place. [citation omitted] For, if the unit determination fails to relate to the factual situation with which the parties must deal,

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may accord great weight to the longstanding interpretation placed upon a statute by the agency charged with its administration. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969).

> efficient and stable collective bargaining is undermined rather than fostered.
>
> To accord automatically to a subgroup of employees such as truck drivers, severance from a larger established and stable bargaining unit merely on the basis of the existence of the traditional job classification and a request for a separate unit encompassing such classification, does not, in our opinion, adequately discharge this basic and far-reaching responsibility placed upon the Board by Congress. A title or classification in common usage does not necessarily establish that separate special interests exist and are preponderant. This can be determined only by making an informed judgment based upon an analysis of the factual circumstances bearing upon the distinguishing factors present in each case.

Id. at 137-38.

Put simply, the Board, in promulgating its eight-units Rule, has departed from its longstanding interpretation of Section 9 (b) that appropriate bargaining units must be determined based upon the facts of each individual case.

Therefore, the Seventh Circuit erred in finding that the Board is not required to make unit determinations based on the facts of each individual case.

C. Other Statutes Containing the "in each case " Language have been Interpreted to Require Individual, Case-by-Case Determinations.

Other statutes, such as the Postal Reorganization Act (hereinafter PRA), 39 U.S.C. § 1202,[6] that contain the "in

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[6] "The National Labor Relations Board should decide in each case the unit appropriate for collective bargaining purposes in the Postal Service. . . . "

each case" language have been interpreted to require the Board to determine the appropriateness of bargaining units in each individual case. In *United States Postal Service*, 208 N.L.R.B. 948, 952 (1974), the Board stated that "the congressional mandate to this Board in the comprehensive PRA Legislation was to determine 'in each case the unit appropriate for collective bargaining in the postal service.' "

The legislative history of the Postal Reorganization Act indicates that Congress modified Section 1202 to delete the reference restricting appropriate collective-bargaining units to national craft units and to provide instead that the National Labor Relations Board would decide "in each case" the units appropriate for collective bargaining. Staff of Senate Comm. on Post Office and Civil Service, S. 622-3, 93d Cong., 1st Sess., Explanation of the Postal Reorganization Act and Selected Background Material 155-56 (Comm. Print 1973). In settling on the proposal that the Board determine appropriate units for collective-bargaining purposes, the conference committee stated its intent that the Board determine appropriate units for collective bargaining in the Postal Service on the basis of the same criteria applied by the Board in the private sector. *Id.* The conference committee deemed it desirable to leave the determination of appropriate bargaining units entirely to the judgment of the Board rather than to pre-determine such matters in any way. *Id.*

In light of the above statements of congressional intent, the Board determined that Congress did not indicate a desire that it depart from its traditional community-of-interest approach. *United States Postal Service*, 208 N.L.R.B. at 953. Thus, the Board considered each of the

petitions pending before it on a case-by-case basis, examining in each case factors unique to the postal service along with factors such as geographic proximity, employee interchange, and distinctiveness of job classifications. *Id.* at 954.

Thus, another statute – one virtually identical to 29 U.S.C. §159(b), enacted by Congress for the purpose of determining bargaining units – has been interpreted by the Board to mean that bargaining-unit determinations are to be made on a case-by-case basis.

Consequently, the Seventh Circuit erred in finding that Section 9(b) of the Act does not require the Board to make unit determinations based on the facts of each individual case.

D. The Board's new Rule deprives the Board of its Congressionally Mandated Flexibility.

The Seventh Circuit stated that the word "case" means a "proceeding" and that the term is broad enough to cover a rulemaking proceeding as well as an adjudicated one. The Seventh Circuit also stated that "case" can be an industry or a sub-set or sub-market of an industry; it need not be a particular dispute between a particular employer and a particular union at a particular plant or establishment. *American Hospital Ass'n v. NLRB, et al.*, 899 F.2d at 656. To carry the Seventh Circuit's argument to its logical end, the Board could conceivably promulgate a rule in the aluminum-smelting industry (the industry being a single case, according to the Seventh Circuit's definition), or the tire and rubber industry, or the textile industry, or any other industry, designating the number

of appropriate units in each of these industries, or as the Seventh Circuit has put it, in each such case. Such rules would, according to the Seventh Circuit's rationale, comport with the congressional directive that collective-bargaining units be determined on a case-by-case basis. However, this is not what Congress intended when it instructed the Board to determine collective-bargaining units based upon the facts of each individual case.

Congress intended that the Board exercise flexibility in determining bargaining units based on the facts in each case. The Fourth Circuit in *NLRB v. Frederick Memorial Hospital*, 691 F.2d 191, 194 (4th Cir. 1982), indicated its understanding that Congress intended the Board to maintain flexibility in determining appropriate bargaining units. The Seventh Circuit also has recognized the Board's need to maintain flexibility in determining appropriate bargaining units. *NLRB v. Esquire, Inc.*, 222 F.2d 253, 256 (7th Cir. 1955). In *Esquire, Inc.*, the Seventh Circuit also stated that, given the multiplicity of factors in determining an appropriate bargaining unit, it would be impossible for the Board to formulate rules that could be rigidly applied in all situations. *Id.* Likewise, this Court has pointed out the difficulty inherent in using inflexible rules to determine appropriate bargaining units, due to the wide variations in employee make-up and the complexities of modern industrial society. *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 134 (1944). *See also NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) (expressed doubt as to the validity of developing a rule that could define all managerial employees).

In 1935, Congress was informed of the need to maintain flexibility in determining bargaining units by

Chairman of the National Labor Relations Board Francis Biddle:

> It is impossible, however, to lay down a definite rule for the determination of the appropriate unit, for such an attempt would result in rigidity and confusion. The whole system of industrial control and development depends on flexibility, and such considerations must be taken into account as the question of management and supervision, routine employment contracts, existing plans of collective bargaining, and the distinctiveness of the occupation.

Hearings on S. 1958 before the Senate Comm. on Education and Labor, 74th Cong., 1st Sess. 83 (1935), Leg. Hist., Vol. I at 1459. Indeed, Secretary Perkins, who authorized the "in each case" language, expressed the importance of flexibility in the Act. Hearings on H.R. 6288 before the House Comm. on Labor, 74th Cong., 1st Sess. 283 (1935), Leg. Hist., Vol. II at 2757. The Board's Rule eliminates the flexibility needed to determine bargaining units appropriate to the factual circumstances of each case.

The Board's need to maintain flexibility in determining bargaining units is evident in the statutory language that units are to be determined "in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter." 29 U.S.C. §159(b) (1973). An individualized determination of bargaining units appropriate in a particular facility will better assure employees the " 'fullest freedom in exercising . . . [their] rights.' " *American Hospital Ass'n v. NLRB, et al.*, 718 F. Supp. 704, 712 (N.D. Ill. 1989) (*quoting* 29 U.S.C. §159(b)). The history of labor relations in this country reflects the

wisdom of Congress' choice for a dynamic process requiring such flexibility with regard to changing circumstances, company to company.

Therefore, the Seventh Circuit erred in finding that Section 9(b) of the Act does not require the Board to make unit determinations based on the facts of each individual case.

E. The Substance of the Board's new Rule is Contradicted by the Board's own Decisions and Those of the Various Courts of Appeals.

The Board's Rule that the designated eight units are always appropriate in the acute-care health industry (barring "extraordinary circumstances" that are virtually impossible to find), flies in the face of the Board's own past determinations and those of other courts of appeals. These cases establish that, in fact, these eight units are *not* always appropriate in every acute-care hospital. *See, e.g., NLRB v. Frederick Memorial Hospital, Inc.*, 691 F.2d 191, 194 (4th Cir. 1982) (unit composed of registered nurses only, found to be inappropriate); *Long Island Jewish-Hillside Medical Center v. NLRB*, 685 F.2d 29, 34-35 (2d Cir. 1982) (unit of registered nurses limited to one of several divisions of a city-wide hospital found inappropriate); *NLRB v. HMO International/California Medical Group Health Plan, Inc.*, 678 F.2d 806, 809-12 (9th Cir. 1982) (unit composed of registered nurses only, found inappropriate); *Beth Israel Hospital and Geriatrics Center v. NLRB*, 677 F.2d 1343, 1345 (10th Cir. 1981), *cert. denied*, 459 U.S. 1025 (1982) (unit limited to registered nurses only, found inappropriate); *Vicksburg Hospital, Inc. v. NLRB*, 653 F.2d 1070, 1074-75

(5th Cir. 1981) (unit composed of combined service, maintenance, and technical employees found to be appropriate); *St. John of God Hospital, Inc.*, 260 N.L.R.B. 905, 906 (1982) (unit composed of registered nurses and technical employees found appropriate); *Community Health Services, Inc.*, 259 N.L.R.B. 362, 363 (1981) (unit composed of all professional employees found appropriate); *Appalachian Regional Hospitals, Inc.*, 233 N.L.R.B. 542, 543-44 (1977) (combined unit of service, maintenance, and technical employees found to be appropriate); *Kaiser Foundation Health Plan of Colorado*, 230 N.L.R.B. 438, 439 (1977) (unit of registered nurses only, found to be inappropriate); *Sutter Community Hospitals of Sacramento*, 227 N.L.R.B. 181, 184 (1976) (separate units of service and maintenance employees found to be inappropriate).

Therefore, the Seventh Circuit erred in upholding the Board's eight-units Rule.

II.

EVEN IF A RULE PRESUMING EIGHT UNITS MIGHT OTHERWISE BE APPROPRIATE, THE BOARD'S MAKING SUCH A PRESUMPTION VIRTUALLY IRREBUTTABLE VIOLATES THE SECTION 9(b) "IN EACH CASE" REQUIREMENT.

Although the Seventh Circuit did not believe that Section 9(b) required the Board to make unit determinations on an individual case-by-case basis, the Court also held that such a requirement, to the extent it exists, has been satisfied by the Board's formal rulemaking process. The Seventh Circuit evidently concluded that the gathering of evidence and testimony at the rulemaking hearings satisfied any such case-by-case requirement. However,

the relatively small sampling of evidence adduced at these hearings pales in comparison to the specific evidence adduced at the numerous past trials and hearings held over the years to determine appropriate bargaining units in the acute-care health industry. Contrary to the vast compilation of evidence adduced at these adjudicatory hearings – which conclude that these eight units are not always appropriate – the Board established that eight units are always appropriate, based on its sampling of evidence adduced during formal rulemaking.

It is a fundamental precept of American jurisprudence that true facts are best elicited when there is an adversarial hearing, with opportunity for cross-examination. *See, e.g.*, Sward, *Values, Ideology And the Evolution of the Adversary System*, 64 Ind. L.J. 301, 316 (1989). In numerous adjudicatory hearings in the past, and regardless of what standard was utilized by the Board or by the particular court, the Board or the court found, as did the courts of appeals, that craft units or registered-nurse-only units were not appropriate in certain circumstances. However, the present Board, based upon the "truths" that it ascertained during the non-evidentiary "hearings" (consisting of statements and arguments by various special interests) held prior to formulating its Rule, determined that craft units and registered-nurse-only units were always appropriate in the health-care industry.

A fact-specific adjudication with cross-examination will always elicit the truth better than a mere study, no matter how broad. The Board's new Rule creates a

presumption that is virtually irrebuttable.[7] It defies logic that the Board would have the power and authority to create a Rule incapable of contradiction by any employer in the health-care industry, when that Rule is based on "evidence" that is, by its very nature, not of the highest reliability (based on a study, instead of on fact-specific adjudicatory hearings with right of cross-examination) and when the most reliable evidence (that gleaned from such fact-specific adjudications by the Board over the years) itself contradicts the very substance of the new Rule!

It must be concluded that, at the very least, such a presumption, being virtually irrebuttable, does not satisfy the individual-case requirement of Section 9(b). Thus, even if the Board's presumption of eight units in the acute-care health industry is otherwise appropriate, those provisions of the new Rule making that presumption

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[7] The Court has previously upheld rulemaking by various federal agencies where those agencies have included within their rule a "safety valve" that allows an individual or entity affected by the Rule, a meaningful opportunity to demonstrate that such individual or entity should be excepted from the rule's application because of special circumstances. *See, e.g., E.I. duPont de Nemours & Co. v. Train*, 430 U.S. 112, 128 (1977); *Permian Basin Area Rate Cases*, 390 U.S. 747, 771-72 (1968); *FPC v. Texaco, Inc.*, 377 U.S. 33, 40-41(1964); *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 204-05 (1956); *National Broadcasting Co. v. United States*, 319 U.S. 190, 207, 225 (1943). By contrast, the NLRB's eight-units Rule does not provide affected parties a meaningful opportunity to challenge the Rule's application, since it provides that virtually all of the factors successfully relied on by parties to challenge NLRB unit determinations in the past are no longer viable.

irrebuttable must be struck down. A rule establishing a rebuttable presumption of eight units would at least allow the particular health-care party to rebut the determination as to the appropriateness of the petitioned-for unit by presenting evidence sufficient to overcome the presumption, and such evidence could certainly include the factors considered by the Board and the courts for the past 13 years.

In short, the Board's eight-units Rule, as constituted, effectively creates an irrebuttable presumption of unit appropriateness irrespective of circumstances that would justify a lesser number of units in a particular case. Therefore, the Board's eight-units Rule should be adjudged invalid.

III.

THE BOARD'S EIGHT-UNITS RULE IS CONTRARY TO CONGRESS' ADMONITION TO AVOID UNDUE PROLIFERATION OF BARGAINING UNITS IN THE HEALTH-CARE INDUSTRY.

In 1974, Congress amended the National Labor Relations Act to cover all private health-care institutions, including non-profit hospitals. Act of July 26, 1974, Pub. L. 93-360 §1(a),(b), 88 Stat. 395. However, due to the fact that health-care institutions provide care for the sick, the aged, and the infirm, Congress sought to provide certain restrictions on unit proliferation in the health-care industry, since patient treatment cannot tolerate the interruptions occasioned by labor disputes.

Because of such concerns, Senator Taft sought to limit the number of bargaining units appropriate in the

health-care industry to five.[8] S. 2292, 93d Cong., 1st Sess. (1973), *reprinted in* Legislative History of the Coverage of Non-Profit Hospitals under the National Labor Relations Act, 1974, at 457-58. However, Senator Taft withdrew this bill and opted instead for a compromise, an admonition in both the House and Senate Committee Reports expressing Congress' concern that the Board give due consideration to preventing proliferation of bargaining units in the health-care industry. S. Rep. No. 766, 93d Cong., 2d Sess. 5 (1974); H.R. Rep. No. 1051, 93d Cong., 2d Sess. 6-7 (1974). Legislative history indicates that Senator Taft withdrew his original bill because of concerns raised that the five-units "Rule" was too rigid and deprived the Board of the flexibility needed to determine units on a case-by-case basis. Legislative History of the Coverage of Non-Profit Hospitals under the National Labor Relations Act, 1974, at 113-14.

The Board and the Courts of Appeals have recognized the Board's obligation to adhere to the congressional admonition in considering the appropriateness of bargaining units in the health-care industry. *See. e.g., NLRB v. HMO Int'l/California Medical Group Health Plan, Inc*, 678 F.2d 806, 808 (9th Cir. 1982); *St. Francis Hospital*, 271 N.L.R.B. 948, 951 (1984).

The Rule as promulgated by the Board fails to pay heed to the congressional directive to give due consideration to avoiding proliferation of bargaining units in the

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[8] 1) All professionals; 2) all technical employees; 3) all clerical employees; 4) all service and maintenance employees; and 5) guards.

health-care field. The Rule that eight units are appropriate for all acute-care hospitals throughout the country actually promotes unit proliferation, since a lesser number of units would almost never be found appropriate. This concern was aptly stated by Judge Zagel in the district court below:

> There are general directives which the Board must follow whenever it makes a unit appropriateness decision in whatever the industry. But Congress drew attention to health care by adding another concern, which must be addressed by the Board in certifying bargaining units in that industry. We understand this to mean that when the Board takes action or crafts policy with respect to bargaining units involving health care employees, it must use the means least likely to cause unit proliferation to achieve their objective. Although we can agree with the Board that the eight units they establish are appropriate and in many instances may match the natural divisions among the employees and health care institutions, we can envision other divisions, perhaps fewer divisions, in the varied health institutions which would be equally reasonable.

American Hospital Ass'n v. NLRB, 718 F. Supp. 704, 714 (N.D. Ill. 1989).

Consequently, the Board's eight-units Rule should be adjudged invalid, as the Rule promotes unit proliferation in the health-care field.

CONCLUSION

This Honorable Court should reverse the judgment of the United States Court of Appeals for the Seventh Circuit and hold that the Board's inflexible Rule for acute-care hospitals does not satisfy the case-by-case requirement contained in Section 9(b) of the Act, nor does it give due consideration to Congress' admonition to avoid undue proliferation of bargaining units in the health-care industry. As such, the Rule is invalid and should be stricken.

In the alternative, if this Court should uphold the presumption of eight units, it should nonetheless hold that the present eight-units Rule is invalid, in that the Rule does not allow parties to rebut the presumption with the factors relied upon by employers for the last 13 years.

In light of the foregoing, this Honorable Court should reverse the judgment of the Seventh Circuit and hold the Board's eight-units Rule invalid.

Respectfully submitted

JEFF WEINTRAUB
Counsel of Record

RICHARD D. BENNETT
WEINTRAUB, ROBINSON, WEINTRAUB
& STOCK P.C.
Suite 2560 One Commerce Square
Memphis, Tennessee 38103
(901) 526-0431

Attorneys For Amicus Curiae
St. Francis Hospital, Inc.